National Association of
NAB
BROADCASTERS

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July 3, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CS Docket No. 96-83 (Restrictions on Over-The-Air Reception Devices)

Dear Mr. Caton:

Today the National Association of Broadcasters submitted a letter, referring to the above-captioned proceeding. It was sent to the Chairman, the other Commissioners, the General Counsel and the Chiefs of the Mass Media Bureau and Cable Services Bureau, plus additional Commissioner legal assistants and staff.

Attached is an "original" and 10 copies of the letter. Please associate these materials with the records of the above-captioned proceeding.

Please contact the undersigned directly if you have any questions.

Sincerely,

Barry D. Umansky

Enclosures

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July 3, 1997

VIA HAND DELIVERY
Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Susan Ness
Commissioner Rachelle B. Chong
Federal Communications Commission
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Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Re: Broadcast Antenna Rules - CS Docket No. 96-83

Dear Commissioners:

This letter responds to Matthew C. Ames' letter to Anita Wallgren, Legal Adviser, Officer of Commissioner Ness, dated May 1, 1997, and to Nicholas P. Miller's letter to Chairman Hundt, dated June 23, 1997. These *ex parte* letters advance certain legal arguments in connection with the above-captioned proceeding.

Mr. Ames contends, based on legislative history, that Section 207 of the Telecommunications Act of 1996, does not authorize the Commission to preempt restrictions that impair the installation of antennas designed to receive over-the-air television on the premises of leased real property.

Mr. Miller asserts that Section 207 of the Telecommunications Act of 1996 does not contain the statutory language "required by law" to validate a taking of private property by an administrative agency, and thus does not authorize the Commission to "take" the property of owners of leased real property, such as apartments, by preempting restrictions that impair the installation of antennas designed to received over-the-air television signals.

For the reasons set forth below, the arguments advanced by Mr. Ames and Mr. Miller are not well founded.

I. THE LANGUAGE OF SECTION 207 IS CLEAR ON ITS FACE: THE FCC CAN EXTEND ITS RULES PREEMPTING RESTRICTIONS THAT IMPAIR THE INSTALLATION OF ANTENNAS DESIGNED TO RECEIVE OVER-THE-AIR TELEVISION TO THE PREMISES OF LEASED REAL PROPERTY.

Mr. Ames' legislative history argument is flawed because it overlooks a bedrock rule of statutory construction. According to the "plain meaning" rule, when the language of a statute is clear on its face, there is no need to attempt to divine the legislative intent from legislative history. Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 717 (1984). "There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses."

Pacificorp Capital v. United States, 852 F.2d 549 (Fed. 1988); see also Overseas Education Ass'n, Inc. v. Federal Labor Relations Authority, 876 F.2d 960 (D.C. 1989) ("When the intention of the legislature is so apparent from the face of the statue that there can be no question as to its meaning, there is no room for construction").

The plain language of Section 207 states that the Commission "shall . . . promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals."

Mr. Ames' reliance on the asserted "failure" of Congress to use the terms "all viewers" or "any viewer" rather than "a viewer" is syntactically immaterial, as the distinction between "all" or "any" and "a" is purely semantical. Furthermore, according to The Merriam Webster Dictionary, the indefinite article "a" is "used to indicate an unspecified or unidentified individual," and thus, contrary to Mr. Ames' contention, does not restrict the class of viewers referred to by the statute. Furthermore, Congress' failure to modify the term "restrictions" with any limiting adjectives or articles indicates plainly that Congress did not intend to preempt some restrictions but not others. Mr. Ames' argument is nothing less than an attempt to "manufacture" ambiguity. Indeed, for the language of Section 207 to state what Mr. Ames contends, the statute would have to contain the following text:

> The Commission shall . . . promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, . . . ***provided however, that this section does not apply to restrictions that impair the installation of antennas with respect to the premises of leased real property.*** [italicized text added]

As such language is absent, Section 207 is plain on its face. There are no limitations on the class of viewers or restrictions to which it refers.

Even if it is assumed for the sake of argument that Section 207 is somehow ambiguous, the legislative history simply does not support Mr. Ames' claims. The House Report explicitly identifies restrictive covenants and homeowners' association rules as "examples," rather than an exhaustive list, of restrictions the Commission is to prohibit. Contrary to Mr. Ames' contention, there is no material distinction between restrictive covenants or homeowners' association rules and lease agreements. In each case, there is a private contractual agreement between two parties concerning occupancy and restrictions on the use of real property.

In sum, the plain language of Section 207 and the logic of the legislative history require the Commission to extend its rules preempting contractual or regulatory restrictions that impair the installation of antennas designed to receive over-the-air television to the premises of leased real property.

II. THERE IS NO "TAKING" CREATED BY THE EXTENSION OF THE ANTENNA PREEMPTION RULES TO THE PREMISES OF LEASED REAL PROPERTY

Mr. Miller's "takings" argument is likewise flawed because its premise is false. There is no "taking" created by the extension of the antenna preemption rules to the premises of leased real property.

A regulation results in a per se taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party or "denies all economically beneficial or productive use of land." Smith & Boyer, Survey of the Law of Property 16 (2d ed. 1971). It is well settled that if a regulation does not result in a per se taking, courts will engage in an "ad hoc" inquiry to examine "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations." PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980). When properly analyzed, the regulation proposed here does not constitute a taking.

The regulation proposed here is distinguishable from the Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and the District of Columbia Circuit Court of Appeals' decision in Bell Atlantic Telephone Companies v. FCC, because (1) no "stranger" to the owner is granted rights with respect to an owner's property, and (2) the regulation does not authorize a permanent interference with the owner's property interests. Rather, the "takings" issue is properly analyzed under the standard set forth in the Supreme Court's decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, reh. den., 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978). The Court identified the following factors which inform and guide its analysis:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. Id. at 124, 57 L. Ed. 2d at 648 (quotations omitted).

The regulation proposed here is analogous to other health, safety and general welfare regulations imposed on landlord-tenant relationships (i.e., provision of heat, smoke detectors, utility hookups) and serves the important governmental interest of providing all citizens, no matter where they reside and what their economic status may be, with access to free over-the-air television programming of their choosing. The regulation proposed here would have a very limited impact on the property rights of affected owners.

Accordingly, pursuant to Penn Central Transportation and contrary to Mr. Miller's assumption, the regulation proposed here simply does not constitute a taking. Thus, Section 207

permissibly requires the Commission to extend its rules preempting restrictions that impair the installation of antennas designed to receive over-the-air television to the premises of leased real property.

* * *

Congress has spoken. The Commission should be faithful to its charge and pre-empt contractual and regulatory restrictions which "impair" a viewer's ability to receive free over-the-air television service. The argument that a distinction can be drawn between leased property and owned property is contrary to the plain language of the statute adopted by congress.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
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